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ALTERNATIVES TO CUSTODY AND PUNITIVE CULTURES IN ENGLAND AND ITALY *

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The purpose of this article is to assess the role of alternatives to custody in relation to the prison system, and to suggest tentative ways in which they can trigger a real process of decarceration. Our analysis will focus on England and Wales (hereafter, *England*) and Italy, two countries whose different judicial philosophies epitomise how social problems are perceived, and can be tackled, within a Common Law framework on the one hand, and a Codified Law framework on the other. In this article the choice of the term *alternatives to custody* instead of *community sentences*, is due merely to comparative purposes. Surely, the two countries under examination present with widely different *cultures of punishment*, as can be elicited from their respective imprisonment rates. These are 93.3 per 100,000 population-for the UK, and 55.1 for Italy (Council of Europe, 1992). These incarceration rates seem to indicate much more a difference in the *demand for punishment* than a substantial difference in the respective aspects of offending (see, Wilkins, 1991).

Nevertheless, we believe that England and Italy may be regarded as exemplary cases of two diverse judicial traditions which, due to recent circumstances and developments, are beginning to converge. In other words, the two traditions, England's Common Law and the Italian Napoleonic traditions are in a sense moving towards one another. We allude, for example, to the shift of the Italian procedural code from an inquisitorial towards an accusatorial model (Nappi, 1989). Conversely, we are thinking about the call for a written set of general laws in Britain and for precise measurable penalties as opposed to traditional jurisprudence and court discretion (Mount, 1991; Charter 88, 1992; Benn, 1993).

Alternatives to custody or to liberty?

The debate about alternatives has substantially failed to ascertain whether their implementation has reduced the overall amount of punishment inflicted on offenders. One of the reasons for this failure may be found in the difficulty with which attempts to define alternatives themselves are met. Alternatives to custody include a barrage of measures, and, contrary to popular myth, they include all interventions whose explicit or implicit aim is to prevent or reduce the likelihood and indeed the length of a custodial sentence. In sum, they include just about anything which is not imprisonment (see, Vass, 1990: 1-17)

Alternatives have been characterised, and by and large are still being seen, as a **monster in disguise**, a **Trojan horse**. They are often defined as alternatives to freedom, as punishment which restricts leisure and free choice in the community rather than a set of devices which challenge the hegemony of the prison. Unnecessary and harmful additions to the process of administering punishment, they are said to widen the net, and to target individuals who previously would not have entered the criminal justice system in the first place. Statistics on the prison population in England and Wales indicate a 9% and a 6% increase in the periods 1988-89 and 1989-90 respectively. Although a decrease was recorded between 1990 and 1992 (from 53,182 to 45,817), the prison population is projected to rise to 51,500 in 2001, an increase of 13% on 1992 (Home Office, 1993a). Moreover, now that 19 out of the 21 new prisons are open, and with two other establishments (Blakenhurst and Doncaster) due to open in 1994, the number of extra prison places since 1985 will be brought to over 11,000 (Home Office, 1993b). Indeed, rather than reducing the capacity of the prison for adult offenders, the British Government is reportedly contemplating to expand the provision for prison places by **re-enacting** the old concept of the **hulks** (disused boats to be used as floating prisons). It is also considering new criminal justice powers to underpin plans for new secure detention centres for persistent offenders aged 12-15, doubling the maximum prison sentence for most teenage offenders from one year to two years, and setting up a separate national secure detention centre to hold young teenage girls, aged 12-15, who commit three or more imprisonable offences (Guardian, 1993; Home Affairs Committee, 1993). In short, we are back to the repeated cycle of administering a sharp shock to **young thugs**, with the difference that whilst in the 1930s, 1940s and early 1980s Governments spoke of **short sharp shocks** (e.g. Criminal Justice Act 1948), now one gets used to a revised version of that policy that re-instates the supremacy of punishment in the form of **long and diverse sharp shocks**.

These data seem self-evident and appear to be an indictment of alternatives which, originally designed to provide diversion from the penal system, appear to have become a supplement to it (e.g. Austin and Krisberg, 1981; Cohen, 1985; Hudson, 1984; Cavadino and Dignan, 1992 among many others). But contrary to these claims, other authors, though recognising the weaknesses of alternatives to custody, have challenged the nature and misuse of the net-widening concept. For example, McMahon (1989), Vass (1990: 77-114), Vass and Weston (1990) remark that documentation of net-widening is problematic, and that in some places empirical research proves that it does not occur (see also Vanstone, 1993). Moreover, economic explanations as to the cost-benefit preferability of imprisonment or non-custodial alternatives are not always satisfactory and comparisons are suspect. Despite the high quality of some economic oriented studies, in fact, none of these can be regarded as conclusive (Scull, 1984; Greenberg, 1990). Despite all claims and the massive, somewhat contradictory literature available on the subject matter, knowledge concerning the relationship between alternatives and prison remains incomplete.

Problems emerge when quantitative measurements are carried out. An increase in the prison population, for instance, does not necessarily imply a failure on the part of alternatives to custody. Nor does a decline in the overall number of prisoners indicate that alternatives are playing a role in that process. Data may waver due to factors such as: police tactics, legislative changes, sentencing practices, social, gender and ethnic characteristics of offenders, length of prison sentences, the general political climate, and the social **demand** for punishment.

It is our contention that appropriate changes in the ways in which alternatives are utilized can genuinely lead to decarceration. We believe that the range of alternatives available in a particular country is not an indication of potential decarceration observable in that country. The prevailing **culture of punishment** in a national context affects the nature of available alternatives, the willingness to use them, and finally the punitive degree embedded in them. In the following pages we will make suggestions as to how alternatives could be utilized with a view to genuine decarceration. At the same time, we will hint at the cultural obstacles which hamper the process of decarceration itself in the two countries under examination.

Alternatives as policies of tolerance

In England, not all alternatives fail to act as true alternatives. There is some evidence that some local projects (particularly where there appears to be close inter-agency co-operation) do work as real alternatives to prison. Furthermore, some evidence, though impressionistic, on probation day centres appears to suggest that such centres may be in a position to really act as alternatives, but are effectively prevented from doing so due to decisions taken by sentencers. These often have too significant an influence on the focus and the orientation of the work carried out by probation staff (Harris, 1992). Indeed, in some cases, courts discount the possibility of placing on probation with day centre requirements *high risk offenders* (i.e. those who would appear likely to receive immediate long prison sentences). In other words, it is often the case that courts *divert* offenders *from* alternatives *to* prison.

In doing so, many sentencers believe they fulfil the expectations of so-called public opinion, whose mandate \hat{u} they assume \hat{u} requires safeguards, a robust defence and protection through the imposition of custodial punishments. On the one hand, this belief is propagated by the very *culture* of the judiciary who assume to be the bastions of the *British way of life*. The selective process for the appointment of the judiciary based on privilege and patronage, which is characteristic of the English system, perpetuates the power of sentencers to define and act on policy. Hereditary appointments and lay recruitment of untrained judges and magistrates put the judiciary in a particular position vis-a-vis the community they are purported to represent. They seem to feel that their function is less to conform to precise principles of justice than to mirror the average set of values, or even the changing moods, of the often underdefined community. In fact, in the name of the *community*, Weberian principles regarding the rationality and predictability of law may often be suspended. On the other hand, sentencers *diverting* offenders from alternatives on the basis of public concern seem to rest their practice upon ill-informed views of public attitudes towards sentencing. When the *public* has been asked to express opinions on criminal justice issues, a stronger propensity for alternatives to custody has emerged than that displayed by courts (Shaw, 1982; Ruggiero, 1991a). Of course, this is not to deny the fact that *public opinion* changes according to the circumstances, the context, media representations of particular if not atypical cases (e.g. the often negative, indeed punitive responses against particular types of offenders such as murderers or other groups such as deinstitutionalised schizophrenics and their own personal experiences).

The effectiveness of alternatives to act as true alternatives, with a measurable effect on the prison population, may depend on what type of offenders are given alternatives. According to data provided by Bottomley and Pease (1986), most offenders who are given alternative sanctions are (or would be) short-term prisoners, serving up to six month sentences. These represent less than 20% of the actual prison population at any one time, though they constitute 51% of receptions. In short, there are at one and the same time two problems with this penal disposition: a *revolving door* effect which allows many individuals to experience custody for short periods (thus capturing a broader population), and a *closed door* effect which keeps those with longer prison sentences inside (without much of a chance of receiving alternative community sanctions), thus creating congestion and overcrowded conditions. It comes as no surprise, therefore, that the effect of alternatives on the overall prison population is almost negligible. Moreover, decarceration usually appears to affect whole new populations among which Miller (1991) listed the following: the tractable patient, the interesting offender, the verbal neurotic, the compliant homeless person, the white middle-class delinquent. These promise unusual rates of success in treatment and probably would not be otherwise institutionalised. In brief, *we allow alternatives only so long as they don't threaten institutions* (Miller, 1991: x)

An important cultural barrier opposes true decarceration and the use of alternatives. This is the belief, embedded in a reassuring complacency, that the prison system is aimed at dangerous offenders whose violence would not be restricted otherwise. In fact, this is not the case with most prison systems worldwide (Ruggiero, 1991b). In most countries the percentage of violent prisoners is so low that, if imprisonment were reserved only for them, this would curtail the population in custody by an average of 90%. As Miller suggests, violent and dangerous offenders should become the symbol of decarceration strategies. *If I could do something decent and humane with these most threatening delinquents, then the whole system would be shaken* (Miller, 1991: 91). The problem is, therefore, to focus on the *intractable*, which allows to address the highest values justifying custody. *If we didn't isolate and abuse the intractable we weren't likely to institutionalize a simple burglar. If we didn't institutionalize a burglar, we couldn't very well institutionalize a truant or a runaway* (Miller, 1991: 91).

According to the British Government agenda, alternatives or *community sentences* should be strengthened and made more demanding. The idea of introducing national standards for community service, or toughening up probation orders by expanding day centre provisions, or introducing new combinations such as community service and probation, are illustrations of an attempt to polish up the image of alternatives as punishment in the community (Criminal Justice Act, 1991). In this way, it is assumed, alternatives would be tantamount to real, harsh community sanctions. This policy implies the abandonment of flexibility and discretion in favour of more rigid regimes, whose purpose is to impose a structure in the life-style of offenders whilst subjecting them to constraints and suspending their rights (Cavadino and Dignan, 1992; Vass, 1990). The effort to make alternatives more attractive to sentencers caused what has been termed *a policy of punitive bifurcation*.

In the Criminal Justice Act 1991 rigour in administration and enforcement is recommended with respect of community penalties. They are expected to play a full part in their own right in the structure of punishment, and should not be viewed as alternatives to custody. But the increased harshness of community punishments may well result in more offenders being incapable of complying with orders, thus *forcing* sentencers to impose custody. Therefore, it seems to us that the Act does not simply make alternatives more attractive to sentencers, as Cavadino and Dignan imply, but that it makes them less reliable as measures whose aim is to keep prison sentences at bay. Furthermore, the more structure and control applied, the more the opportunities are rife for law infringements, underground and hidden practices away from the public eye, challenges, rebellion, and conflict in the context of administration and enforcement of penal sanctions. It is almost as if offenders who are given these measures are *set up* to fail in order to be moved up the penal ladder and into the ambit of imprisonment. In some sense, it is a double-jeopardy experience: it is punishment with the higher risk of imprisonment.

Alternatives alone cannot be expected to resolve the prison crisis, which is a policy crisis (Ashworth, 1983). Coherent policy decisions can be more effective than alternatives in reducing the prison population. In this respect, the example relating to disciplinary proceedings is illuminating. About 95% of all charges concerning offences within prisons are dealt with by governors. In 1989 Governors heard 81,215 charges. The majority of these were found proven (95%). The most commonly used penalty was forfeiture of remission, equivalent for each offence to a maximum nine months prison sentence. The prison service itself calculated that in 1988 this kind of disciplinary measure added a figure equivalent to 600-700 to the annual average prison population. As the Woolf Report writes: *This is an astonishing extra burden on the Prison Service. It needs to be controlled and relieved. The award or loss of remission on this scale [is] in effect keeping people longer [in prison]* (pp. 426-27: 14, 401, our emphasis).

The reduction, or the abolition of this disciplinary measure would in itself curtail the prison population by 600-700. This is also dictated by the fundamental principle recognised by the Woolf Report, that penalties equivalent to quite long sentences should not be inflicted by the prison administration but by a court (Ryan, 1992). Long penalties can only be justified by an infraction of the criminal law, and not by a breach of disciplinary rules. We suggest therefore that prison governors should not adjudicate in cases where loss of remission is possible.

An important reductionist policy can also be devised with respect to prison capacity. Each prison has a certified number of prisoners it can hold without overcrowding. This Certified Normal Accommodation (CNA) should constitute the real ceiling for each particular institution. The Woolf Report calls for the introduction of a rule *that no establishment should hold more prisoners than is provided for its normal level of accommodation, with provisions for Parliament to be informed if exceptionally there is to be a material departure from the rule* (p. 433: para. 7). While we agree with this principle, we are sceptical about its formulation. The possibility may always arise that *exceptionally* turns into *routinely*, the definition of an exceptional situation being highly subjective. Our scepticism also derives from the fact that a relentless *creation* of exceptions and emergencies often legitimizes conservation and hampers reform. However, our suggestion is that, if prisons are to hold as many inmates as their CNA, waiting lists for prisoners should be established like those existing in Northern European countries (Christie, 1993), though there may also be something drastically wrong with waiting lists. They can send the spiral of long waiting lists and crowded prisons into perpetual motion. In other words, there is a danger of both increasing the prison population and expanding the waiting lists. However, the effectiveness of this measure in terms of the enhancement of a *culture of decarceration* as opposed to a *culture of incarceration* would be invaluable. In many cases, the fact that offenders are queuing for a place in prison could prove that they can be retained in the community. As Christie puts it: *Recognizing the queue is to recognize that those lined up are not dangerous, are not monsters. They go to prison û eventually û for other purposes than the protection of the public* (Christie, 1993: 36). Waiting lists, moreover, would have an inhibiting effect on enforcement agencies and sentencers, who would in a sense be forced to genuinely consider custody as a last resort.

Reductionist policies may also work as alternatives to custody if remand prisoners are targeted. The remand population is a significant part of the total prison population, and its proportion increased significantly over the last few years. Remand prisoners accounted for 14% of the total prison population in 1975 and 22% in 1989. This represents an increase from 5,600 in 1975 to 10,500 in 1988, although the figure dropped to 10,100 in the first month of 1990, but went back to 10,405 in December 1992 (NACRO, 1993). The majority of these prisoners are awaiting trial (82%), whereas the remainder are convicted but are awaiting sentence. A significant section of remand prisoners are eventually given non-custodial sentences (26%) and 12% are acquitted.

It has to be noted that the increase of remand prisoners indicates both a higher number of prisoners awaiting trial or sentence, and offenders being remanded for longer periods. In other words, to use the phrase of one of the authors, a type of crowding occurs in prison institutions which resembles traffic congestion (Vass, 1990). Quick and easy passages are delayed, and gradual build ups ensue. In 1989, for example, the national average time between committal and the start of hearings for defendants remanded in custody was over 10 weeks. Incidentally, averages do not describe the plight of those awaiting trial for six months, a year or more. Bearing in mind that also an increasing number of defendants remanded in custody are committed to the Crown Court, a depressing situation emerges where too many people are serving a sentence before being sentenced.

Furthermore, we suggest that a limit be placed on the time a prisoner, whether on remand or under sentence, can be kept in police cells on behalf of the prison service. Such practices cause human suffering and crisis and, at the same time, are extremely expensive. The estimated cost of holding prisoners in police cells for a six-month period until 31 August 1990 was £ 175,000 (Lord Justice Woolf, 1991).

An increase in the number of hostel places, and an expansion of diversionary schemes can also boost a decarceration process. Again, diversion should not be confined to minor offenders, but in all cases in which prosecution does not serve the immediate public interest. The criminal justice system should be regarded as a resource to be used parsimoniously. In this light, experiments such as mediation and symbolic reparation should be high on the agenda. These schemes meet with difficulties because they are only applied when defendants plead guilty, and are often discarded by sentencers because presumably they only serve the interests of offenders (Davis, 1992). Compensation, moreover, is viewed with scepticism because of the inability of many offenders to make substantial repayments to the victims. Mediation and reparation are thus becoming additional penalties to custodial punishment. In this way, even experiments which are supposed to be inspired by diversionary principles for offenders and concern for victims end up being permeated by the prevalent retributive culture. As Mathiesen (1990) remarked, *In view of the poverty of the offenders, such compensation would have to be the duty of the state. It is actually fantastic that advanced states [à] have not long ago introduced automatic insurance, from birth, against crime, but has left the question of insurance to the individual's private initiative. Very modest fees, as part of a taxation package, would be enough to cover the cost* (Mathiesen, 1990: 164).

Some of our suggestions as to how alternatives could work may find resistance in the prevailing culture of punishment in England. Others seem inapplicable because they do not incorporate the criteria which are customarily adopted by legislators when alternatives are created. Prompted by prison disturbances, and in somewhat emergency situations, alternatives bear the mark of a package of measures designed to preempt or defuse future conflicts in prison. The centrality of prison is therefore never questioned, and alternatives seem to owe their existence to the existence of prison, to whose peaceful management, in the last analysis, they are expected to contribute. Depenalisation is not on the agenda. Alternatives, in sum, seem only to be important in that they allow prison to be run smoothly. We will see that a similar philosophy is embedded in alternatives to custody in Italy, to which we will now turn.

Italy: Alternatives and the centrality of custody

Two types of alternatives to custody are in operation in Italy. One that completely diverts offenders from the prison system, as its application is ruled by courts hearing specific cases and dealing with specific defendants. The second

type relates to offenders who are already serving a sentence. These alternatives are formally ruled by judges who are in charge of prison supervision. A form of probation belongs to the former type and is known as **affidamento in prova al servizio sociale**. It entails supervision by the local social services and can be given to defendants convicted to a maximum of three months sentence. The alternative measure known as **semilibertŌ** also belongs to the former type, and is granted to offenders who are sentenced up to six months. It consists of day release allowed for work, education, or other rehabilitative activities outside the prison institution (Padovani, 1990).

Both sets of alternatives can also be granted to offenders serving longer custodial sentences. In their case, a **taste** of prison is deemed appropriate before alternative punishments are considered. These can only be granted after their behaviour in prison has been **scientifically observed** for a period of at least a month. Alternatives such as **house arrest**, **early release**, and **leave awards** belong to the second type. House arrest can be given to those sentenced up to two years of imprisonment, whereas early release (a form of remission) potentially applies to all prisoners, and consists of a 90 days discount for each year served. Leave awards also can potentially be obtained for one or two weeks periods by all prisoners, and are meant to allow offenders some time with their family. The number of days granted to individual prisoners for leave awards must not exceed 45 days per year.

Available data show that about 8,000 offenders were granted house arrest each year during the 1980s, whereas around 6,000 enjoyed day release. More than 30,000 leave permissions were awarded in 1990. This figure does not suggest that almost all the 35,000 Italian prisoners enjoyed leave awards. Rather that 10,000 **deserving** prisoners enjoyed three each in a year (ISTAT, 1991).

Although these figures allow for prudent optimism, the philosophy underpinning alternatives to custody, and the way in which they are implemented, raises serious concerns. A closer look at the prison population shows, in fact, that an equal number of individuals were detained in 1982 as in 1992. About 35,000 offenders were serving a custodial sentence both before and after the two main pieces of legislation which introduced alternatives to custody came to operation. These two pieces of legislation, respectively approved in 1986 and 1991, seemed to be designed with a view to a substantial decarceration process. With hindsight, one could argue that they only represented an emergency response to prison disturbances taking place throughout the 1970s, as they seem to have had a negligible impact on the overall amount of punishment inflicted on offenders. It is true that between 1985 and the late 1980s the prison population oscillated by some 5-6,000, but the decrease which brought it back to its **normal** level (35,000) is not to be attributed to the impact of alternatives. When, during the course of this period, a rise was observed, the most effective decarceration device proved to be a general *amnesty*. This typically Italian emergency manoeuvre acts as a decarceration as well as a decriminalisation tool, in that not only does it annul custodial sentences, but it also erases the offences committed off the offenders' record. General amnesties only cover a fixed range of crimes, but are important in decongesting prisons and alleviating the workload of courts. For decades, general amnesties acted as ante-litteram alternatives to custody.

It is not surprising then that alternatives themselves maintain some traits which make them akin to emergency measures such as **judicial pardon**. In fact, alternatives to prison took over when general amnesties were less frequently given.

The central principle inspiring and constructing alternatives to custody in Italy, as in England, is therefore connected with the necessity to manage the prison system and to diffuse its internal tensions. As Pavarini (1988) points out, only those alternatives to custody which result in the reduction of the penal system as a whole deserve the recognition as alternatives. He adds, **Nor does the potential availability of legal alternatives to custody boost what is really needed: decriminalisation and depenalisation** (Pavarini, 1988: 50).

In Italy, considerable scepticism is expressed about the possibility of minimizing the use of custody through legal alternatives only. This debate engages students of criminal law and sociologists against the background of a distinctive juridical tradition. It is within the framework of this tradition that alternatives to custody are discussed and their philosophy assessed and criticised.

Three main principles may be singled out which render alternatives to prison necessary and just within the prevailing philosophy of law in Italy. The first refers to the **just deserts** paradigm, whereby not all offences deserve restriction of personal freedom. Even in a strictly retributive logic, not all offences can be legitimately compensated by a quantum of liberty. The debate around prisons which engaged classical reformers can be referred to as a matrix for a contemporary need for diversion. Centuries ago custody was regarded as **excessive**, therefore as unjust, for a wide range of offences. In this respect, Cesare Beccaria took on the risk of sounding utopian when, in his effort to be

consistent, he claimed that all property offences should only be punished with a fine. Only more *vulgar* demeaners, he implied, need to be met with the impingement on the individual right to freedom (Beccaria, 1970).

Alternatives to custody, therefore, are seen to be primarily just. But, according to another tradition, they also live up to the principle of utility. Here another juridical argument, which is also part of the Enlightened legacy, can be invoked by reformers and advocates of decarceration. Elements of utilitarianism were present in the founding fathers of Italian penology: Beccaria, Cattaneo, Filangieri. The latter, in effect, expressed profound uncertainty as regards the role of prisons in moulding disciplined citizens. Moreover, because in the Italian situation *prison as a factory* was hardly a realistic feature, even the mundane goal of making prisoners productive while serving a sentence could not be achieved. Prison, it was believed, did not mend the material damage caused by crime; on the contrary, it added to that damage by favouring recidivism.

Finally, arguments in support of alternatives to custody also derive from the Italian positivist tradition. Most positivists were convinced that *therapy* aimed at individual rehabilitation and prevention, that is to say against recidivism, could often be more successful if carried out outside the prison walls (Ferri, 1929; Sighele, 1911; Eilero, 1879). Many positivists would also argue that rehabilitation itself was amongst the most important elements which could guarantee public protection, by them identified as *social defence*.

It can be noted that advocates of decarceration in Italy do not see the necessity of mobilizing contemporary critical or abolitionist penology in support of their argument. This perhaps explains why, theoretically, the drive towards alternatives to custody in that country is so widely accepted, though in comparison to England, only a limited number and type of alternatives is actually put into practice. Drawing on traditional penology, most scholars analyse the impact, the necessity and the shortcomings of the recent prison reform with the unspoken notion that custody must be the last resort. The Italian Constitution, in turn, makes it very clear that imprisonment, although a last resort, is not to be intended as punishment per se, nor as a vindictive measure which makes up for the offence committed. Pure retribution is unconstitutional: custody must lead to rehabilitation. If it does not, it has no reason to exist.

According to the current legislation, alternatives can only be granted to prisoners who demonstrate a willingness to participate in the rehabilitation process. A series of rewards and punishments within the main form of punishment administered are imposed which forces a never ending regime of destructive self-control on the inmates. As we will explain later, prisoners know that their behaviour may affect the degree of punishment suffered and the rewards eventually to be gained (Gallo and Ruggiero, 1989; 1991). Alternatives to custody, in other words, hinge on custody as they owe their very existence to the necessity of keeping the prison management smooth, and prison disturbances at bay. It is important to underline that the only authority which is in a position to modulate the intensity of punishment, that is to say to grant awards and inflict supplementary punishments, is the prison administration. All decisions regarding day release, permission to leave, and other non-custodial benefits, although formally sanctioned by the judiciary, are in the last analysis taken by prison governors.

In this context, the first constitutional dilemma with regard to Italian penal law emerges. The supervision of the prison regime, and all decisions regarding the prisoners' treatment, should be the prerogative of the judiciary. The interference of the prison administration in these matters can be regarded as illegitimate, the prison staff being employed by the executive (the Ministero degli Interni). In sum, the way in which alternatives to custody are put into practice violate the constitutional division of powers.

Furthermore, in the Italian context, alternatives to custody have made punishment indeterminate and its intensity discretionary. This is at odds with the Enlightenment legacy cherished by many Italian jurists. Critics point out that punishment now confounds the traditional principle of *exchange* (Mosconi, 1988). Its purely retributive function is, in other words, visibly declining. We no longer witness a pure infliction of pain, exchanged with a passive party receiving that quantum of pain. The exchange seems instead to be of an active nature, in that it works in two directions, and entails a production of symbolic behaviour also on the part of the recipient. A collusion takes place which demands the participation of the clients. However, these reciprocity and collusion are, in the Italian context, unconstitutional. As already remarked, benefits and rewards are offered to those who persuade the administration that the process of their re-education is underway, if not wholly accomplished. This adds to the burden of prisoners' self-control. Many inmates are obsessed by the idea of being perennially spied upon, an obsession favoured by the abuse, on the part of the administration, of the phrase *scientific observation of behaviour*.

Alternatives to custody have negative repercussions on the offenders to whom they are denied. By virtue of the cooperation required of the inmates, these are led into becoming personalised, as benefits and rewards of the prison

reform are selective and strictly granted *ad personam*. This causes a loss of collective bargaining power among the prison population as a whole, with the result that the living conditions inside the institutions deteriorate. On the other hand, the inmates who are not granted alternative punishments are likely to be regarded as undeserving, and therefore unworthy of any effort to improve their personal condition in custody. Alternatives to custody, in sum, in acting as a sort of *performance related pay or reward* may make custody worse. They may create unequal relationships and can act as a divisive means in an oppressive and psychologically taxing and competitive environment.

The philosophy of alternatives to custody, which is narrowly linked to the philosophy of custody itself, falls short of fundamental notions of justice inscribed in the Constitution. According to the Italian fundamental law, punishment must be informed by a series of principles which correspond to a written set of constitutional guarantees. Punishment is a pre-established penalty in response to an offence. The type and the limits of this penalty must be decided by the judicial authority within the sphere of individual rights (human guarantees), and forms established by a written procedural code. In this respect, three principles should be borne in mind. The first has a most simple formulation: punishment is the judicial consequence of an offence, and the latter is the pre-condition *sine qua non* of punishment: *nulla poena sine crimine*. This indicates that punishment is not a *prius* but a *posterius* in relation to an offence, and therefore it does not incorporate any preventative element (Ferrajoli, 1989). The second principle regards the strict legality of punishment. *Nulla poena sine lege* is the notion conveyed by Article 1 of the Italian Penal Code, whereby nobody can undergo forms of punishment which are not established by law. Therefore, punishment must have exact and discernible limits, and must be definite in its form and intensity. Certainty and equality are also included in this principle. The third principle is summarized by the formula *nulla poena sine iudicio*: punishment must be concretely determined by the jurisdiction, which is also charged with the task of supervising the agencies appointed for its implementation.

The above principles constitute the backcloth against which the debate concerning alternatives to custody currently takes place in Italy. Critics point out that alternatives are inconsistent with the notions of *certainty* and *equality* in that they are tailored on something which is not exactly discernible and scientifically measurable: the behaviour of prisoners and their dangerousness. Moreover, when alternatives are denied on the grounds of prisoners' behaviour, punishment becomes a tool allegedly aimed at pre-empting future offences rather than responding to them (Ferrajoli, op. cit). For example, alternatives to custody are denied to allegedly dangerous prisoners. In these cases, it is expected that the prisoners themselves provide evidence that they are not likely to reoffend. If they fail to do so, they are denied the benefit of non-custodial alternatives. In other words, they are punished *ed with* custody before they commit a crime. In this way, prison becomes a *prius* rather than, as said earlier, a *posterius* to crime.

The second principle is also disregarded when alternatives to custody are denied on the basis of the offenders attitude or personality. For example, consider the case of prisoners who do not show a willingness to participate in the rehabilitative process. In such cases, it is the degree of conformity displayed by offenders which determines the amount of pain they suffer, rather than the severity of their law breaking. But no general law of the state dictates that punishment be geared to the degree of conformity shown by offenders. Alternatives to custody, therefore, also fall short of the principle which claims *nulla poena sine lege*.

The third principle is shattered by the practical way in which alternatives are implemented. As already mentioned, decisions concerning the amount of pain to be inflicted are not taken by the judicial authority, but by the prison administration. When alternative, non-custodial, forms of punishment are granted, these result from favourable, or extolling, reports sent to appointed magistrates by prison governors. So-called scientific behaviour observation is in fact carried out by untrained prison personnel, and their role ends up outweighing the role of the judiciary. Non-custodial alternatives are in effect ruled by prison governors rather than by judges. This has serious implications. A climate is created whereby individual officers or governors are deemed responsible for the amount of punishment suffered by prisoners. Due to their pivotal role, prison staff are then put under extreme pressure, and are often exposed to bribes, or even to retaliation.

A brief look at the way in which alternatives are granted may also add to the argument. Research findings show that day release and permission to leave are usually awarded to prisoners with a *regular* life-style. Those who are married, for example, have in this regard higher chances than singles, for they are deemed to be more reliable. They are favoured by virtue of their conformist routine and because it is assumed that they bear responsibility for their dependants (Agazzi et al, 1991) Conversely, young single people find it harder to obtain non-custodial treatment in that their conduct is judged irregular and unpredictable. The consequence is that young first-time offenders may be treated worse than consummate recidivists.

Measures such as day release for work are obviously granted to those who *invent* a job for themselves outside. Many prisoners find a convenient employer as a result of their network of relatives and friends. Others are helped in this task by agencies and voluntary organisations. But the more marginalised prisoners, for example those belonging to ethnic minorities, are devoid of social networks and, because they are often illegal immigrants, they are also *invisible* to or uninformed about voluntary organisations and charitable agencies. Therefore, alternatives operate in a two-tier fashion, whereby socially disadvantaged prisoners see their disadvantages perpetuated by the very prison reform which was originally intended to favour them (Olgiati, 1991).

This and other discriminatory elements which are incorporated in alternatives to custody are the target of the Italian reform movement. Reformists argue that punishment displays a variable content, it is indeterminate, it is not based on legally assessed facts but on discretion. This is deemed to be unacceptable in a country where the scientific determination of punishment is an undisputed part of the judicial tradition. In order to fit and be consistent with Italian law and expectations, alternatives should not be discretionary, but, e prison sentences, be granted on the basis of objective judicial criteria. Alternatives should be mandatory, determined by the judiciary and withdrawn from the influence of the executive. Only mandatory alternatives can be consistent with the process of decarceration in Italy, although the shift of power from the executive to the judiciary may itself raise concerns, as the example of England **seems to prove**.

Conclusion

Although embedded in different cultural and legal traditions, the two countries examined show comparable traits. In this article we have tried to suggest ways in which alternatives could genuinely boost a decarceration process. We have also hinted at the punitive cultures which, in England and Italy, hamper the development of alternatives and make them coherent with the conservation rather than the demise of prison.

It is interesting to note that, in both countries, a critique can be levelled at the excessive polarisation of administrative power in granting alternatives or denying them. Prison administrators are entrusted with authority which should be the property of the courts. We pinpointed the prerogative to lengthen prison sentences by means of imposing disciplinary punishments in England, and by means of rejecting prisoners' bids for alternative punishments in Italy. We argue that this shift of power which occurred in Italy, from the judiciary to the executive, seems to characterise many contemporary Western democracies. An interesting exception to this is the experience of England, where almost the opposite is in operation, judges seem to exercise superior control over executive power.

A fundamental difference between the two countries emerged in the respective judicial philosophies. Codified Law in Italy and the Common Law in Britain influence the way in which reformers can argue the case for decarceration and alternatives. While in the English Criminal Justice Act 1991 the concept of punishment is of paramount importance, in the Italian constitution the very notion of punishment is nowhere to be found, and is anathema among most jurists. A written constitution offers some space for reformers to take issue with those aspects of the legislation which fall short of constitutional principles. Among these is that rehabilitation is the only legally accepted function justifying the very existence of the prison system. One particular aspect of this philosophy is the rejection of short sentences, which are deemed to hinder rehabilitation and entice criminal careers. When, as is often the case, prison practices betray this and other principles, scope for criticism and reform present themselves.

An interesting comparative element is to be found in the differing appreciation of the concept of *discretion* as understood and practised in the two countries examined. In Italy, when the word discretion is used in the context of the judiciary or the prison system, its very semantic content confines closely with that of arbitrariness. Here, a precise distinction of roles, a mandatory set of penalties, and a series of written individual guarantees, do not allow for subjective interpretation or discretionary decision making. A subtle, well founded, suspicion informs the relationships between citizens and the authorities in Italy, where rights and prerogatives are thoroughly defined. Conversely, discretion in Britain does not necessarily imply negative connotations. Here, it encapsulates a distinctive relationship between citizens and authority which could be defined as paternalistic. Hay (1977) traced this

paternalistic origin of the British judiciary back to the 18th century, when *assaults on the structure of authority determined the English ruling class to repel any attacks on the mystery and majesty of the law* (Hay, 1977: 59). Hence the unique and to most Europeans scandalous, way in which magistrates and judges are recruited in England (though recently the first possibility of introducing some changes to the system have been voiced, see Runciman, 1993). Garland (1985) locates paternalism within a number of related institutions and agencies, which are at the same time normalising, corrective and segregative. He argues that the development of the welfare state buried the remaining criteria of guilt, responsibility, legal evidence and proportionate punishment. Guilt is no longer the founding principle of legal intervention. *Besides guilt, intervention can now be premised upon a *condition*, a *character* or a *mode of life*, which indicates a failure to meet one's social obligations or else an inability to do so* (Garland, 1985: 235) Although in the English context there has been a critical view about discretion as being inimical to consistent sentencing, we believe that discretion, on the other hand, may offer space for innovation, and may be synonymous with flexibility. In this sense, reformists in England may pursue their case by orienting discretion towards the development of alternatives to custody. The two contexts, in sum, seem to offer symmetrical space and arguments for real reform and **decarceratio** n.

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